

82 - 1373

No.

Office-Supreme Court, U.S.
FILED

FEB 14 1983

IN THE

ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

October Term, 1982

ERNEST G. MILLER,

Claimant/Petitioner

against

**PITTSTON STEVEDORING CORPORATION, and
NEW JERSEY MANUFACTURERS INSURANCE
COMPANY,**

Employer/Carrier Respondents

and

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,**

Federal Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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i.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the Administrative Law Judge erroneously construed the Court's decisions in *P.C. Pfeiffer Co. v. Ford*, 444 U. S. 69 (1979) and *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249 (1977), by holding that petitioner did not satisfy the status requirement of 33 U. S. C. 902(3) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. 901 *et seq.*, thereby precluding him from collecting workmen's compensation under that Act, when the Court's decisions in *P.C. Pfeiffer* and *Caputo* indicate that petitioner qualifies under the aforementioned Act's status requirement because of the petitioner's participation in the loading and unloading process of maritime work?

2. Whether the lower Court erred in upholding the Benefits Review Board's

ii.

decision that since it had found the petitioner did not meet the situs requirement of 33 U. S. C. 903(a) of the aforementioned statute, it did not have to rule on petitioner's status as a maritime worker under 33 U. S. C. 902(3) of the same Act?

3. Whether the Administrative Law Judge, the Benefits Review Board, and the lower Court erroneously construed the Court's decisions in *P.C. Pfeiffer Co. v. Ford*, 444 U. S. 69 (1979) and *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249 (1977), by holding that petitioner was not injured on a situs covered by 33 U. S. C. 903(a) of the aforementioned Act, despite evidence that in his maritime capacity as deliverer of important loading and unloading ship gear to another pier, the situs of the petitioner's accident was covered by the amendments?

iii.

PARTIES.

The parties in the trial Court below were the petitioner, Ernest G. Miller, the Employer respondent, Pittston Stevedoring Corporation and the Carrier respondent, New Jersey Manufacturers Insurance Company, and the Federal respondent, Director, Office of Workers' Compensation Programs.

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No.
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

- - - - - X

ERNEST G. MILLER,
Claimant/Petitioner,
against

PITTSTON STEVEDORING CORPORATION, and
NEW JERSEY MANUFACTURERS INSUR-
ANCE COMPANY,

Employer/Carrier
Respondents,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS,

Federal Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT.

- - - - - X

OPINIONS BELOW.

The Administrative Law Judge's decision below is unreported, and is appended hereto as Appendix C.

The Benefits Review Board's decision is unreported, and is appended hereto as Appendix B.

The Court of Appeals' decision is unreported, and is appended hereto as Appendix A.

GROUNDS ON WHICH JURISDICTION IS
INVOKED.

1) The nature of the proceeding. Petitioner, who has been working as a longshoreman since 1968, filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. 901 *et seq.*, subsequent to an accident he suffered while in the employ of his employer, after which

he was rendered temporarily totally disabled. Petitioner, who testified that his duties as a longshoreman include going aboard a ship and loading and unloading cargo in a warehouse by means of a forklift, which he operates, was injured while driving a trailer loaded with ship gear to another pier owned by his employer.

The Administrative Law Judge of the United States Department of Labor denied the petitioner's claim by decision and order, dated June 25, 1980 on the grounds that the petitioner had not met either the status or situs requirements of 33 U. S. C. §902(3) and §903(a) of the aforementioned statute. On appeal, the Benefits Review Board sustained the denial of the claim on the sole basis that petitioner had failed to satisfy the situs requirement of 33 U. S. C. §903(a) of

the Act. The Board's decision and order was dated February 22, 1982. This is an appeal from the decision of the United States Court of Appeals for the Third Circuit affirming the order of the Benefits Review Board.

2) The judgment or decree sought to be reviewed was dated and entered on November 16, 1982.

3) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U. S. C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution, Article III, Section 2.

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United

States, and Treaties made,
or which shall be made,
under their Authority;
... to all Cases of admir-
alty and maritime Juris-
diction ..."

33 U. S. C. §902(3) - refer to
Appendix D for text of this provision.

33 U. S. C. §903(a) - refer to
Appendix D for text of this provision.

28 U. S. C. §1254(1) - refer to
Appendix D for text of this provision.

STATEMENT OF THE CASE.

Petitioner, a 35 year old man with a tenth grade education, has been employed as a longshoreman since 1968. He is a member of the International Longshoreman's Association and is classified as a Hold Man. Petitioner has testified that his duties as a longshoreman include going aboard a ship and loading and unloading cargo in a warehouse by means of a fork-lift, which he operates.

Petitioner testified (without contradiction) that on the third, fourth, and sixth days of May, 1978, he did longshoring jobs, and that he did longshoring jobs on the thirteenth and fourteenth of June, 1978. On other days, he was a truck or trailer driver. A calendar of such information was kept by the petitioner and was submitted and accepted at the hearing.

The employer does not deny that it used petitioner, as well as other longshoremen, to transport cargo and gear to various other piers at which they performed stevedoring operations of loading and unloading. The employer used petitioner, as well as other longshoremen, because it was convenient to do so and because it was an integral part of their longshore operations.

Petitioner was not hired from the outside, as an independent truck driver.

On June 23, 1978, petitioner was assigned the task, by his supervisor for the employer, Ronald Petrocelli, of driving a trailer from Port Newark, New Jersey to a marine terminal at Wilmington, Delaware. Petrocelli testified that on the aforementioned date, he and the petitioner loaded the ship gear aboard the trailer. The Administrative Law Judge found that the gear was to be used in the loading and unloading of a car ship berthed in Wilmington, Delaware.

Later in the afternoon, shortly after departing from Port Newark to deliver the trailer loaded with ship gear to Wilmington, Delaware, a front tire on petitioner's truck blew out on the New Jersey Turnpike, resulting in an accident, which has left petitioner temporarily totally disabled.

Petitioner filed for compensation under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. 901 *et seq.* (hereinafter, the Act). Administrative Law Judge Reno E. Bonfanti issued a decision and order in favor of the employer, Pittston Stevedoring Corporation, and the insurance carrier, New Jersey Manufacturers Insurance Company (N.J.M.). The Administrative Law Judge, relying upon the Court's decisions in *P.C. Pfeiffer Co. v. Ford*, 444 U. S. 69 (1979) and *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249 (1977), held that the petitioner satisfied neither the status requirement of the Act (33 U. S. C. 902[3]), nor the situs requirement (33 U. S. C. 903[a]). The Benefits Review Board (BRB 80-1052) upheld the Administrative Law Judge's decision on the ground that the petitioner

did not satisfy the situs requirement of 33 U. S. C. 903(a). The United States Court of Appeals for the Third Circuit, relying upon the Court's decisions in *P.C. Pfeiffer Co.* and *Caputo*, upheld the decision and order of the Benefits Review Board.

Petitioner is being denied his statutory right to collect compensation under the Act, because of the lower court's erroneous construction of the Court's decisions in *P.C. Pfeiffer Co.* and *Caputo*. Under a proper interpretation of these decisions, the petitioner would satisfy both the status requirement of §2(3) and §3(a). Because of the erroneous construction of *P.C. Pfeiffer Co.* and *Caputo*, petitioner has been denied his statutory right to compensation under the Act. As a result of this denial, petitioner has suffered appreciable financial loss, as

well as mental anguish. This presents a substantial Federal question not heretofore determined by this Court.

POINT I.

PETITIONER WAS A MARITIME EMPLOYEE AS DEFINED BY 33 U. S. C. 902(3), AND INTERPRETED BY THE COURT IN *P.C. PFEIFFER CO. v. FORD*, 444 U. S. 69 (1979) AND *NORTHEAST MARINE TERMINAL CO. v. CAPUTO*, 432 U. S. 249 (1977). THE ADMINISTRATIVE LAW JUDGE, THE BENEFITS REVIEW BOARD, AND THE LOWER COURT'S DETERMINATION THAT HE WAS NOT A MARITIME EMPLOYEE DENIES PETITIONER HIS RIGHTS UNDER THE AFOREMENTIONED STATUTE. THIS PRESENTS A SUBSTANTIAL FEDERAL QUESTION, NOT HERETOFORE DETERMINED BY THIS COURT.

We are not unmindful of the strict requirements governing an individual's right to collect compensation under 33 U. S. C. 901 *et seq.*, or the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972. The amended provisions at issue here are the status requirement of 33 U. S. C. 902(3) and the situs requirement of 33 U. S. C.

903(a). In order to collect compensation under the Act, a worker must meet the statutory definition of employee under §2(3), as well as be injured on a situs covered by §3(a). It is the former provision that we shall *first deal with*.

In 1972, Congress amended §2(3) to include within the Act's coverage "any person employed in maritime employment, including any longshoremen or other person engaged in longshoring operations, and or harborworkers, including a ship repairman, shipbuilder, and shipbreaker."

In *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. at 273, this Court in discussing the requirements of §2(3), noted that "the Act focuses primarily on occupations - longshoreman harbor worker, ship repairman, shipbuilder, shipbreaker." Both the text and the history demonstrate a desire to provide continuous coverage

throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover "longshoremen" it had in mind persons whose employment is such that they spend at least some of their time in indisputable longshoring operations, and who, without the 1972 Amendments, would be covered for only part of their activity.

Now clearly, the petitioner fits within these boundaries. The fact that he drove the truck under his supervisor's orders notwithstanding, the petitioner's noncontested testimony established that he spent at least some of his time engaged in indisputably longshoring operations, such as loading and unloading cargo in a warehouse, or going aboard a ship.

Furthermore, this Court's decision in *Caputo* implies that even if the petitioner had never engaged in so-called traditional longshoring tasks he would be covered by the 1972 Amendments to the Act. This is in great part, due to the Court's recognition of the changing nature of longshoring operations. In particular, this Court in *Caputo* noted the impact of containerization on the way ships are loaded and unloaded. In *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. at 271, the Court states that the respondent in question, whose job it "was to check and mark items of cargo as they were unloaded from a container," was "a statutory 'employee' when he slipped on the ice." The Court noted on the same page that "this task is clearly an integral part of the unloading process as altered by the advent of containerization and was intended

to be reached by the Amendments." Accordingly, the petitioner must also be assumed to be a statutory "employee" for purposes of coverage by the Act. He was injured while transporting ship gear to another pier, gear, which without the use of, it would be impossible to load or unload the cars from the ship. Clearly, this task is as much an integral part of the loading process as checking is.

In *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U. S. at 80 (1979), this Court refused to limit §2(3) coverage merely to those land based workers who handle containerized cargo. This Court stated on the same page that "land based workers who do not handle containerized cargo also may be engaged in loading, unloading, repairing, or building a vessel."

The petitioner was not handling containerized cargo when he was injured, but

he was an integral part of the loading and unloading process for the car ship berthed at Wilmington, Delaware.

The Court recognized that the crucial factor in determining whether an individual is a maritime employee is in the nature of the employment, not the location. *P.C. Pfeiffer Co. v. Ford*, 444 U. S. at 83. Thus, the fact that the petitioner was injured while driving on the New Jersey Turnpike is immaterial in a consideration of his status as a maritime employee under §2(3).

The nature of the petitioner's assignment on the day he was injured was to deliver the unloading gear to Wilmington so that the car ship could be unloaded. In *P.C. Pfeiffer Co. v. Ford*, 444 U. S. at 83, this Court noted that "persons moving cargo directly from ship to land transportation are engaged in maritime employ-

ment. A worker responsible for some portion of that activity is as much an integral part of the process of loading and unloading a ship as a person who participated in the entire process." It is undeniable that petitioner was responsible for some portion of the loading and unloading process, so he has clearly met the status requirement of §2(3).

Finally, I would like to discount an almost identical limitation made by this Court in both *P.C. Pfeiffer Co.* and *Caputo* as inapplicable to the circumstances of petitioner's case. In *P.C. Pfeiffer Co.*, 444 U. S. at 83, this Court noted "there is no doubt, for example, that neither the driver of the truck carrying cotton to Galveston, nor the locomotive engineer transporting military vehicles from Beaumont, was engaged in maritime employment even though he was working on the maritime

situs. Such a person's 'responsibility is only to pick up stored cargo for further transshipment'."

In *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. at 267, this Court stated "the example also makes it clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truck-drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered."

Although the petitioner drove a truck, he must be distinguished from the category of workers this Court justly disqualified from the Act's coverage in *P.C. Pfeiffer Co.* and *Caputo*. The categories specifically eliminated from coverage by this

Court's language played no role at all in the loading or unloading process, while the petitioner's role in delivering ship gear to load and unload cars, was critical. In addition, those categories of workers specifically disqualified by this Court had at no time engaged in the traditional work role of the longshoreman, while uncontested testimony establishes that the petitioner worked in this role at least several days during the month he was injured.

We feel that the petitioner's work role before and on the day he was injured qualifies him to satisfy the status requirement of §2(3).

We feel that his qualifying status as a maritime employee under that statute is consistent with this Court's interpretation of that statute in *P.C. Pfeiffer Co.* and *Caputo*. We feel the lower Court

erred in its construction of this Court's decisions in those cases. As a result, the petitioner is being denied his statutory right to compensation under the Act. This, we submit, raises an important Federal question which this Court must resolve.

POINT II.

THE SITUS OF PETITIONER'S ACCIDENT WAS COVERED UNDER THE AMENDMENTS. THE ADMINISTRATIVE LAW JUDGE, THE BENEFITS REVIEW BOARD, AND THE COURT BELOW WRONGLY CONSTRUED THIS COURT'S DECISIONS IN *P.C. PFEIFFER CO.* AND *CAPUTO*, AS TO WHAT QUALIFIES AS A SITUS FOR 33 U. S. C. §903(a) PURPOSES. BECAUSE OF THIS FAULTY INTERPRETATION OF *P.C. PFEIFFER CO.* AND *CAPUTO* BY THE LOWER COURTS, PETITIONER HAS BEEN DENIED HIS RIGHTS UNDER THE AFOREMENTIONED STATUTE. THIS PRESENTS A SUBSTANTIAL FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT.

In *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249, this Court at 432 U. S. 252, quoted 33 U. S. C. 903(a):

"Compensation shall be payable ... in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining piers, wharf, drydock, terminal, building way, railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel ..."

In *Sealand Serv. v. Director, Office of Workers' Compensation*, 540 F. 2d 629 (C.A. 3, 1976), the Court suggested that so long as the status requirement was satisfied under §2(3), then there was no real situs requirement under §3(a) as long as it was established that the claimant was an employee "engaged in maritime employment."

The Court, in *P.C. Pfeiffer Co. v. Ford*, 444 U. S. at 80, in footnote 8, stated, "in fact, the language of the

situs requirement lends independent support to the conclusion that Congress focused on occupation rather than location."

By this Court's language in footnote 8, we can infer support of *Sealand's* proposition that once the status requirement of §2(3) is met the situs requirement of §3(a) is satisfied as well if the maritime worker was injured during the course of his employment.

Certainly, if the petitioner meets the status requirement because he was injured while engaged in the loading and unloading process, then he must also meet the situs requirement, since it must be assumed that since he was a maritime worker for purposes of §2(3), and he was injured while carrying out his duties as a maritime worker, then he must have been injured on a covered situs. To affirm

the worker's employee status under §2(3) while rejecting his situs under §3(a) would be a gross contradiction, or at the very least show the statute to be seriously flawed. We do not believe the statute to be flawed, but under the circumstances of the petitioner's case, we feel that a recognition of the *Sealand* holding would be the proper interpretation of the statute.

I would like to point out that this Court in *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249, like in *P.C. Pfeiffer Co. v. Ford*, 444 U. S. 69 (1979), was not called upon to answer the question whether a highway route used for purposes of transporting unloading gear was a situs for purposes of §3(a), but dealt with more traditional situs questions. However, this Court in *Caputo* did not set any specific limitations on what consti-

tuted a situs for purposes of §3(a), and a positive inference in the petitioner's favor must be drawn from that.

Even if the Court's holding in *Sealand Serv. v. Director, Office of Workers Compensation*, 540 F. 2d 629 (C.A. 3, 1976), were to be rejected by this Court, the petitioner still qualifies for situs coverage under the "other adjoining area" language of §3(a).

The petitioner at the time of his accident on the New Jersey Turnpike was delivering ship gear by trailer from his employer's pier at Port Newark to his employer's pier at Wilmington, Delaware. Uncontested testimony at the Administrative hearing established that this ship gear was to be used in the loading or unloading of a car ship at his employer's pier at Wilmington. Furthermore, additional uncontested testimony established

that it was customary for the employer to use the petitioner as well as other longshoremens to transport cargo and gear to other piers, at which they performed stevedoring operations of loading and unloading. The employer used the petitioner and other longshoremens, because it was convenient to do so and because it was an integral part of their longshoring operation.

Therefore, because the ship gear which the petitioner carried in his trailer was critical to the loading and unloading process, and because this was customarily done, the stretch of New Jersey Turnpike where the accident occurs satisfies §3(a) as an "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel . . .," in other words, a situs.

Finally, the Courts below ignored the legislative intent to have 33 U. S. C. 903(a) and 33 U. S. C. 902(3) liberally construed. This Court noted the same in *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. at 273. "The Act focuses primarily on occupations -- longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers, who, without the 1972 Amendments, would be covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover 'longshoremen' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity."

Petitioner satisfies the situs requirement of §3(a). We feel the lower Court erred in its construction of *P.C. Pfeiffer Co.* and *Caputo*, in denying petitioner his coverage under the Act. As a result, the petitioner is being denied his statutory right to compensation under the Act. This, we submit, raises an important Federal question which this Court must resolve.

CONCLUSION.

This Court should grant certiorari and the judgment below should be reversed.

DATED: February , 1983.

Respectfully submitted,

EUGENE CIPRIANI, ESQ.,
c/o JAMES J. GALLO, ESQ.
Attorney for Claimant/
Petitioner
26 Journal Square
Jersey City, N.J. 07306

1a

APPENDIX A.

OPINION OF THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-3146

- - - - - X

ERNEST G. MILLER,

Claimant/Petitioner,

vs.

PITTSTON STEVEDORING CORP., and NEW
JERSEY MANUFACTURERS INSURANCE
COMPANY,

*Employer/Carrier
Respondents,*

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Federal Respondent.

- - - - - X

Petition for Review
Benefits Review Board
(OWCP No. 2-54832)

Submitted Under Third Circuit Rule 12(6)
November 16, 1982
Before: ALDISERT, SLOVITER, and ROSENN,
Circuit Judges.

JUDGMENT ORDER.

After considering the contentions of the petitioner and the employer-carrier respondents, and applying the teachings of *P.C. Pfeiffer Co. v. Ford*, 444 U. S. 69 (1979), and *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249 (1977), it is

ADJUDGED and ORDERED that the petition to set aside the order of the Benefits Review Board be and the same is hereby denied.

Costs taxed against petitioner.

BY THE COURT,

s/ ALDISERT
Circuit Judge

3a

Attest:

s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

DATED: November 16, 1982

1b

APPENDIX B.

OPINION OF THE BENEFITS REVIEW BOARD.

BENEFITS REVIEW BOARD

U. S. DEPARTMENT OF LABOR

No. 80-1052

- - - - - X

ERNEST G. MILLER,

Claimant-Petitioner,

v.

PITTSTON STEVEDORING CORPORATION and
NEW JERSEY MANUFACTURER'S INSUR-
ANCE COMPANY,

*Employer/Carrier-
Respondents.*

- - - - - X

Appeal from the Decision and Order
of Reno E. Bonfanti, Administrative Law
Judge, United States Department of Labor.

Paul A. Gritz, Jersey City, New
Jersey, for the claimant.

Leonard J. Linden (Linden & Gallagher), Jersey City, New Jersey, for the employer/carrier.

Before: RAMSEY, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

PER CURIAM:

This is an appeal by the claimant from the Decision and Order (79-LHCA-2027) of Administrative Law Judge Reno E. Bonfanti pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter, the Act).

The administrative law judge found that claimant was not engaged in employment within Section 2(3), 33 U.S.C. §902 (3), and was not injured on a situs covered by Section 3(a), 33 U.S.C. §903(a). Therefore, he denied claimant benefits under the Act. Claimant appeals, arguing

that he was entitled to coverage under the Act. In addition, claimant argues that the administrative law judge erred in re-opening the record to permit employer to bring in an additional witness.

Preliminarily, we hold that the administrative law judge's decision to re-open the record was not an abuse of his discretion. 20 C.F.R. §702.338; 20 C.F.R. §702.347.

Moreover, having carefully reviewed the record and considered claimant's arguments in this case, we conclude that the administrative law judge's determination that claimant was not injured on a situs covered by Section 3(a) is supported by substantial evidence in the record considered as a whole, is rational and is in accordance with law. 33 U.S.C. §921 (b) (3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359

(1965). Therefore, the administrative law judge properly denied claimant benefits.

In light of this determination with regard to Section 3(a), it is unnecessary for us to reach the Section 2(3) issue.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

s/_____
ROBERT L. RAMSEY, Chief
Administrative Appeals
Judge

s/_____
JULIUS MILLER
Administrative Appeals
Judge

s/_____
ISMENE M. KALARIS
Administrative Appeals
Judge

Dated this 22nd
day of February 1982

5b

FILED AS PART
OF THE RECORD
FEB 22 1982

(date)

Agnes Kurtz / *HS*

(Clerk)

Benefits Review Board

1c

APPENDIX C.

OPINION OF THE ADMINISTRATIVE LAW JUDGE.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
WASHINGTON, D.C. 20036

- - - - - X

IN THE MATTER

of

ERNEST G. MILLER,

Claimant,

vs.

PITTSTON STEVEDORING CORPORATION,

Employer,

NEW JERSEY MANUFACTURES INS. CO.,

Carrier.

- - - - - X

Case No. 79-LHCA-2027

OWCP No. 2-54823

Paul Gritz, Esq., for the Claimant.

Leonard J. Linden, Esq., for the
Employer/Carrier.

Before: Reno E. Bonfanti
Administrative Law Judge

DECISION AND ORDER.

This is a claim for workmen's compensation benefits under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*

The parties stipulated and I accept the following: (1) the employer-employee relationship existed, (2) claimant's injury arose out of and during the course of his employment, (3) claimant was injured on June 23, 1978 and remains temporarily totally disabled, (4) claimant was injured in an accident on the New Jersey Turnpike when he was driving a tractor trailer truck enroute from Port Newark,

New Jersey to Wilmington, Delaware, (5) the truck contained rigging or ship's gear to be used in loading or unloading of a car ship in Wilmington, (6) claimant's average weekly wage at the time of the accident was \$355, for a compensation rate of \$236.67, (7) claimant filed timely notice of the injury (8) claimant is receiving compensation for this injury under the New Jersey Compensation Act, (9) employer filed a notice of controversion on April 18, 1979.

The parties agree that the sole remaining issue in this case is the question of jurisdiction under the Longshore Act. This hinges upon whether the claimant meets the "status" and "situs" requirements of Sections 2(2) and 3(a) respectively, of the Act.

EVALUATION OF THE EVIDENCE.

The 33 year old claimant with a 10th grade education began working as a long-shoreman in 1968. He is a member of the ILA and has a union card indicating his job as a HOLD MAN. He testified that he goes aboard ship in addition to loading and unloading ship cargo in the warehouse by driving a fork lift. The claimant testified that on the morning of June 23, 1978 he was operating a fork lift on the truck live in the warehouse, and after lunch, his supervisor (Petrocelli) told him to go to the garage and pick up the truck, load ship's gear on it, and then drive it to a pier in Wilmington, Delaware. Claimant testified that after loading the truck, he drove onto the New Jersey Turnpike and about 30 minutes later the left front tire blue out and caused the accident. He also testified that when he was

assigned to driving a truck he received \$.25 more per hour than when he did other work. Claimant maintained a calendar for the months of May and June 1978 which were introduced into the record (Exhibit E-1, E-2). Claimant testified that he noted the days, hours, and job assignments on it. He testified that for the month of May 1978, on the 3rd, 4th, and 6th he did "longshore" jobs and the other days he was a truck or tractor driver. For the month of June 1978 he testified that on the 6th he was a checker (but the calendar shows "truck"), and that on the 13th and 14th he did "longshore" jobs. All other dates until June 23rd show his job as truck or trailer. There is no notation on June 23rd to indicate what work he was doing on that date because claimant testified he logged his time after the end of the day or the following workday. Ronald

J. Petrocelli, an engineer and manager of operations for Pittston, testified that approximately 3 months prior to the accident the claimant was assigned to a regular job as a truck driver to transport gear and gear parts to various places. He further testified that the claimant reported directly to him every morning. Petrocelli testified that on the morning of June 23, 1978, claimant reported directly to him, they assembled ship gear together for transport to Wilmington, claimant loaded the ship gear onto a truck, and then reloaded it onto a low bed trailer pursuant to Petrocelli's instructions, and then after lunch claimant began driving to Wilmington. Petrocelli testified that claimant did not handle any cargo on that day nor on his job as a truck driver.

After careful evaluation of the demeanor and credibility of the witnesses, I credit the testimony of Petrocelli as to the claimant's work on the date of the injury. I do not believe the claimant's testimony that he was working in the warehouse on the truck line, which he said was his "best recollection." I find that on the day of the injury his job consisted solely of loading ship's gear onto a trailer and driving it from Port Newark to a pier in Wilmington, Delaware, about 3 or 4 hours away. I find the accident in which he sustained injuries occurred on the turnpike approximately 30 minutes away from the shipyard. I find that on the date of the injury the claimant did not handle any cargo.

DISCUSSION AND CONCLUSIONS.

In order to meet the "status" requirements of Section 2(3) of the Act,

the claimant must be an employee "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship-builder, and ship-breaker ..." Also, the claimant must meet the "situs" requirement of Section 3(a) of the Act to establish "an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

The term "maritime employment" was defined in *Sedmak v. Perini North River Associates*, 9 BRBS 378 (1978). The Board stated that the claimant's employment must have a realistically significant relationship to maritime activities involving

navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3). This has been referred to as the necessity of a "close functional nexus," or "essential," or "integral part of" a maritime enterprise in order to be covered under the Act. In *P.C. Pfeiffer Co. v. Ford*, 100 S. Ct. 328 (1979), the Supreme Court stated that the crucial factor in the scope of maritime employment is the nature of the activity to which a worker may be assigned. In the case before me claimant was assigned the work of driving a truck, and in so doing, he was injured in a vehicle accident on a public highway, a significant distance from any shipyard or marine situs. The fact that the beginning and ending sites of his route were marine terminals does not give him "status" at any time.

Claimant's counsel cites the case of *Brady-Hamilton v. Herron*, 7 BRBS 409 (1978) to support his contention of coverage under the Act. That case is distinguishable on both status and situs grounds. The employee there was engaged in longshore work at least part of his working day and the gear locker room (2000 feet from water's edge), where he was injured, was found to be an adjoining area for loading vessels. As previously found herein, this claimant was not doing longshore work on the day of injury. In fact, for a period of 3 months he performed maritime jobs only infrequently--not more than 3 days during the month of injury and 3 days during the preceding month. It is recognized that the case of *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 mandates an expansive view toward the 1972 amendments and directs

continuous coverage for employees who would otherwise be walking in and out of federal jurisdiction during their regular performance. However, claimant herein was not in covered employment during any part of the day of injury and the accident occurred on a public turnpike, a considerable distance from navigable waters or "any adjoining area."

Recently, the case of *Fusco v. Perini North River Associates*, 601 F2d 659 (1979), was remanded to the Ct. of Appeals by the Supreme Court for reconsideration in light of the holding in *P.C. Pfeiffer v. Ford*, *supra*, that the term maritime employment refers to the nature of the worker's activities and that it is an occupational rather than a geographic concept. On June 4, 1980 the Ct. of Appeals (2nd Cir.) denied coverage to two sewage disposal construction workers who

were injured on a project over the water. It seems fair to conclude that Sections 2(3) and 3(a) as interpreted by case law requires that for coverage to attach, workers must meet both the "status" and "situs" criteria.

Based upon my analysis and evaluation of this record, I must conclude that the claimant has not satisfied the "status" requirements of Section 2(3) nor was the injury on a "situs" pursuant to Section 3(a) of the Act.

ORDER.

The claim for Ernest G. Miller for workmen's compensation under the Longshoremen's and Harbor Worker's Act is hereby denied.

s/

Reno E. Bonfanti
Administrative Law
Judge

REB/det

Dated: June 25, 1980
Washington, D.C.

APPENDIX D.

TEXT OF 33 U.S.C. 902(3), 33 U.S.C.
903(a) AND 28 U.S.C. 1254.

33 U.S.C. 902(3)

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. 903(a)

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any

adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area, customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of ---

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any state or foreign government or of any political subdivision thereof.

28 U.S.C. 1254

Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

82-1378

U.S. District Court, N.D.

FILED

OCT 13 1963

ALEXANDER L. STEVENS,
CLERK

In this case

Supreme Court of the United States

October Term, 1963

ERNEST G. MILLER

Claimant-Petitioner,

against

PITTSFORD STEVEDORING CORPORATION, and
NEW JERSEY MANUFACTURERS INSURANCE
COMPANY,

Employer-Carrier-Respondents,

and

DIRECTOR OFFICE OF WORKERS' COMPENSA-
TION PROGRAMS

Federal Respondent,

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief in Response to Petition for Certiorari

LEONARD J. LEVINE

LEVINE & GALLAGHER

Attorneys for Respondents' Petition

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Jersey Manufacturers Ins. Co.

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i.

Questions Presented.

1. Was the United States Court of Appeals for the Third Circuit correct in affirming the decision of the Benefits Review Board that the claimant did not meet the situs requirement of 33 USCA 903 (a) of the Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U. S. C. §901 *et seq.*?

2. Was the administrative law judge correct in holding that the claimant did not meet the status requirement of 33 U. S. C. 902 (3) of the Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U. S. C. 901 *et seq.*?

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v.

Parties.

The parties in the trial Court below were the petitioner, Ernest G. Miller, the Employer respondent, Pittston Stevedoring Corporation and the Carrier respondent, New Jersey Manufacturers Insurance Company, and the Federal respondent, Director, Office of Workers' Compensation Programs.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982.

ERNEST G. MILLER,

Claimant/Petitioner,

against

PITTSTON STEVEDORING CORPORATION, and NEW
JERSEY MANUFACTURERS INSURANCE COMPANY,

Employer/Carrier Respondents,

and

DIRECTOR OFFICE OF WORKERS' COMPENSATION
PROGRAMS,

Federal Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT.

Brief in Response to Petition for Certiorari.

Opinions Below.

The decision of the Administrative Law Judge is unreported and is appended hereto as Appendix C.

The decision of the Benefits Review Board is unreported and is appended hereto as Appendix B.

The decision of the Court of Appeals is unreported and is appended hereto as Appendix A.

Constitutional and Statutory Provision Involved.

United States Constitution, Article III, Section 2.

Designation of Corporate Relationships.

Respondents Pittston Stevedoring Corporation and New Jersey Manufacturers Insurance Company, filing this brief in response to Petition for Certiorari, as respondents in this proceeding state that:

This is their original Designation of Corporate Relationships.

Said respondents are not owned by any parent corporations.

Said respondents do not have any ownership interest in any subsidiary (excepting only wholly owned subsidiaries).

Said respondents do not have any affiliates.

Dated: March 10, 1983

Statement of the Case.

By decision and order dated June 25, 1980, Administrative Law Judge Reno E. Bonfanti found that, based upon the substantial evidence herein, the claimant has not satisfied either the "status" requirements of §2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901 *et seq.*, nor was the injury the claimant sustained on a covered "situs" as required by §3(a) of this Act.

By decision and order dated February 22, 1982, on appeal by claimant, the Benefits Review Board concluded that the administrative law judge's determination that claimant was not injured on a situs covered by §3(a) is supported by substantial evidence in the record considered as a whole, is rational and is in accordance with law and held therefore that the claimant was properly denied benefits under the Longshoremen's and Harbor Workers' Compensation Act. The Benefits Review Board in its decision held that in view of the Board's determination with regard to the application of §3(a), that it was unnecessary for the Board to evaluate the §2(3) issue as to whether the claimant had the required status under the Act (decision and order of the Benefits Review Board, p. 2).

The United States Court of Appeals for the Third Circuit affirmed the decision of the Benefits Review Board.

As is set forth at page one of the decision and order of the administrative law judge the parties stipulated and the judge accepted the following:

- “(1) the employer-employee relationship existed,
- (2) claimant's injury arose out of and during the

course of his employment, (3) claimant was injured on June 23, 1978 and remains temporarily totally disabled, (4) claimant was injured in an accident on the New Jersey Turnpike when he was driving a tractor trailer truck enroute from Port Newark, New Jersey to Wilmington, Delaware. (5) The truck contained rigging or ship's gear to be used in loading or unloading of a car ship in Wilmington. (6) Claimant's average weekly wage at the time of the accident was \$355, for a compensation rate of \$236.67. (7) Claimant filed timely notice of the injury (8) claimant is receiving compensation for this injury under the New Jersey Compensation Act (9) Employer filed a notice of controversion on April 18, 1979" (A.L.J. decision, p. 1).

At page two of his decision and order, the administrative law judge in his findings of fact states that on the afternoon of June 23, 1978, the date of the accident herein, the claimant's supervisor Mr. Ronald J. Petrocelli told the claimant to go to the garage and pick up a truck loaded with ship's gear and to drive the truck to a pier in Wilmington, Delaware, from Port Newark Terminal. The claimant had testified at the hearing of February 6, 1980, that he had been working that morning and for several years previously for the employer at Berth 9, of the Port Newark Terminal (transcript, p. 20 of hearing of February 6, 1980).

The claimant alleged that in the course of his employment he went aboard ship, in addition to loading and unloading ship cargo in the warehouse by driving a fork lift, and the claimant further alleged that on the morning of June 23, 1978, he was operating a fork lift on the truck line in the warehouse. He testified that after lunch his

supervisor Petrocelli told him to go to the garage, pick up the truck and drive it to Wilmington, Delaware (decision and order of administrative law judge, dated June 25, 1980, p. 2).

However, on cross examination commencing at page 36 of the minutes of February 6, 1980, the claimant was confronted with a calendar that he had maintained for the months of May, 1978 and June of 1978, which were introduced into the record as Exhibits E1 and E2 (decision and order of administrative law judge, p. 2). The claimant testified that the reason he kept his calendar was to keep track of his hours and job assignments because there was a different pay scale for his work as a truck driver as opposed to other work (decision and order of administrative law judge, dated June 25, 1980, p. 2; transcript of hearing, February 6, 1980, p. 36). When the claimant performed work as a truck driver he would note this work on the calendar as "Truck" (transcript of hearing, February 6, 1980, pp. 38-44). The claimant was forced to concede that, except for five days in May and June of 1978, all the work he performed was as a truck driver (decision and order of administrative law judge, dated June 25, 1980, p. 2; transcript of hearing, February 6, 1980, pp. 38-44). Claimant was unable to state what he actually had done on any of the five days he did not drive the truck (tr., pp. 41, 47).

Furthermore at the hearing of March 21, 1980, claimant's supervisor Ronald J. Petrocelli testified that approximately three months prior to the accident on June 23, 1978, the claimant had been assigned to a regular job as a truck driver to transport gear and gear parts to various places and that the claimant reported directly to him every morning for his work assignments. Mr. Petrocelli testified that on the morning of June 23, 1978, at about eight

o'clock the claimant reported directly to him and Mr. Petrocelli told the claimant that they had some gear to transport to Wilmington, Delaware, and they went together to assemble the gear and the claimant loaded it on to a bed truck. Mr. Petrocelli testified the entire loading process took until approximately 11:30 A. M. at which time the claimant went out to lunch (transcript of hearing, March 21, 1980, p. 104). Mr. Petrocelli testified that the claimant did not handle any cargo on June 23, 1978, nor did the claimant handle any cargo on the job as a truck driver (transcript of hearing, March 21, 1980, p. 105).

Mr. Petrocelli explained that about three months before the accident he was looking for a truck driver to work for the employer to transport gear and gear parts because before that time the employer had used outside truck carriers but it was found that the employer could not obtain truck drivers on a last minute notice. Mr. Petrocelli testified that he therefore assigned the claimant to perform this work as a truck driver and that he never handled any cargo in his job working under Mr. Petrocelli's supervision (transcript of hearing, March 21, 1980, pp. 107, 108).

The administrative law judge held that, after careful evaluation of the demeanor and credibility of the witnesses, the judge credited the testimony of Mr. Petrocelli as to the claimant's work generally and as to the claimant's work on the date of the accident. The judge specifically found that he did not believe the claimant's testimony wherein the claimant alleged that he was working in the warehouse on the truck line on the morning of the date of the accident. The judge found as a fact that on the date of the accident the claimant's job consisted solely of loading ship's gear onto a trailer and driving it from Port Newark to a pier in Wilmington, Delaware, about

three or four hours away. He found that on the date of the accident the claimant did not handle any cargo. The judge further found that the accident that the claimant had on June 23, 1978, occurred on the New Jersey Turnpike approximately 30 minutes away from Port Newark (decision and order of the administrative law judge, dated June 25, 1980, pp. 2, 3).

After an analysis of the pertinent law on the subject, the administrative law judge concluded that the claimant has not satisfied either the "status" requirements of §2(3) of the Act and also that the claimant was not injured on a covered "situs" under §3(a) of the Act, and for these reasons the judge denied the claim (decision and order of administrative law judge, dated June 25, 1980, p. 4).

On the appeal to the Benefits Review Board, the Board by decision and order dated February 22, 1982, concluded that the administrative law judge's determination that claimant was not injured on a covered situs pursuant to §3(a) is supported by substantial evidence in the record considered as a whole, is rational and in accordance with the law, and affirmed the judge's denial of the claim. The Benefits Review Board stated that in the light of the determination with regard to §3(a) as to situs it was unnecessary for the Board to evaluate the §2(3) issue as to status (decision and order of the Benefits Review Board, dated February 22, 1982, p. 2). This decision was affirmed by the Court of Appeals.

POINT I.

The decisions of the administrative law judge, the Benefits Review Board and the Court of Appeals that the claimant was not injured on a covered situs pursuant to §3(a) of the Longshoremen's and Harbor Workers' Compensation Act is supported by substantial evidence and is correct as a matter of law. This decision does not present a substantial federal question not heretofore determined by this court, and therefore the petition for certiorari should be denied.

The administrative law judge in his decision has concluded as a finding of fact that, on the day of his accident, the *sole* job of the claimant herein consisted of loading ship's gear onto a truck and driving it from Port Newark to a pier in Wilmington, Delaware.

The claimant conceded that the accident occurred after he had driven approximately one half hour down the New Jersey Turnpike towards Wilmington, Delaware, from Newark, New Jersey, which would render the site of the accident many miles from Port Newark, New Jersey.

In its seminal decision interpreting the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249, the Supreme Court at 432 U. S. 252 specifically stated that in order for a claim to come within the Act, that pursuant to §903 the injury must occur within a covered situs, and quoted §903 in pertinent part:

“Compensation shall be payable * * * in respect of disability or death of an employee but only if the disability or death results from an injury occurring

upon the navigable waters of the United States (including any adjoining piers, wharf, drydock, terminal, building way, railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel * * *."

In the Court's analysis at 432 U. S. 279, the Court considered the above quoted §903 and noted that Congress intended to expand the coverage situs to include the areas as specified in §903 and not just accidents occurring on the water.

In a subsequent decision, *P. C. Pfeiffer Company, Inc. v. Ford*, 100 S. Ct. 328 (1979), the Supreme Court continued to hold that "to be eligible for compensation a person must be an employee as defined by §2(3) who sustains injury on the situs defined by §3(a)," 100 S. Ct. 332. At 100 S. Ct. 334 the Court stated "the Act as determined above contains *distinct* situs and status requirements. The situs test of §3(a) allows recovery for an injury suffered on navigable waters or certain *adjoining* areas." (Emphasis added.)

In *Sealand Serv. v. Director, Office of Workers' Compensation*, 540 F. 2d 629 (C. A. 3, 1976), which was decided before the *Caputo* case, *supra*, the Court had suggested that there was no real situs requirement under §3(a) as long as the status requirement was satisfied that the claimant be an employee "engaged in maritime employment." However, subsequent to the *Caputo* decision, the Court did recognize in *Dravo Corporation v. Banks*, 567 F. 2d 593 (C. A. 3, 1977) at page 595, that in order for a claimant to be covered by the Act he must also have sustained his injury on a covered situs as set forth in §3(a) of the Act.

In view of the distinct situs and status requirements as clearly set forth in the Act, as well as this Court's recognition of these distinct status and situs requirements, petitioners attempt to argue that the situs requirement is automatically met if the status requirement is met, is completely devoid of legal support.

Furthermore, in his petition, petitioner asserts that even if the situs requirement is not precisely the same as the status requirement, that nevertheless the location of the petitioner's accident was somehow on an "adjoining area customarily used by the employer in the loading, unloading, repairing, or building a vessel."

It is clear that the situs requirement is set forth in §3(a) requires that the injury occur upon the navigable waters of the United States or certain adjoining areas. It is also uncontroverted that the claimant sustained an accident after driving approximately 30 minutes down the New Jersey Turnpike in his truck. The Administrative law judge found and his finding of fact is conclusive, that the claimant had been employed on the day of the accident as a truck driver, not handling any cargo whatsoever, and the administrative law judge found that the claimant had been so employed solely as a truck driver for three months prior to the accident.

As part of the alleged factual basis for this argument that the New Jersey Turnpike is a covered situs, Petitioner alleges that it was uncontroverted that it was customary for the employer to use the petitioner to transport cargo to various piers at which time he performed stevedoring operations of loading and unloading; this assertion is incorrect and completely unsupported by the record. We wish this Court to note that this allegation was specifically

rejected as a finding of fact by the administrative law judge. Therefore the alleged factual basis for this incredible argument that New Jersey Turnpike is a covered situs, is simply not found in the record, and for this reason as well this argument must be rejected.

Petitioner's attempt to transform an inland portion of the New Jersey Turnpike where the Petitioner had his accident, into an area adjoining navigable waters where the employer customarily loads and unloads vessels, is utterly without foundation in the record, and is legally incorrect. If this argument were accepted it would mean that the entire continental United States would become a covered situs, since cargo taken off a ship presumably will be driven inland throughout the United States.

It is submitted that there is no basis in law or in fact to contend that the situs requirement of §3(a) has been satisfied by the Petitioner herein, and on this basis alone this petition should be denied.

POINT II.

The Petitioner was not an employee and did not meet the status requirement of §2(3) of the Act and this is an additional basis for denying this petition for certiorari.

The administrative law judge has found as fact that on the day of his accident the claimant was employed solely as a truck driver, and that the claimant in the morning loaded ship's gear onto a trailer and in the afternoon drove it from Port Newark to a pier in Wilmington, Delaware, and that on the date of his accident the claimant did not handle any cargo. The administrative law judge further found that only for a few days in May and June of 1978 did the claimant handle any cargo in any manner and that on all other days he was a truck driver.

Claimant's attorney's allegation that the employer does not deny that it used the claimant to transport cargo to various piers at which time he performed stevedoring operations of loading and unloading, is incorrect and completely unsupported by the record. We also wish this Court to note that this allegation was specifically rejected as a finding of fact by the administrative law judge.

Based upon the above findings of fact, it is clear that under the decision of the Supreme Court, the claimant was not a covered employee within §2(3).

The claimant has alleged that he is a longshoreman engaged in the process of loading and unloading cargo. However, the judge has specifically found that the claimant was not connected with unloading, or transportation of cargo and this finding of fact cannot now be controverted since it is based upon substantial evidence in the record.

The determination of the claimant's status under §2(3), should begin with the Supreme Court's discussion in *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249, *supra*, which concerned the claims of two workers, Caputo and Blundo. In its discussion, the Court noted at 432 U. S. 264 that, after the 1972 amendments, the Act covered only "employees"—that is workers who were "engaged in maritime employment," which the Act defined to include "any longshoreman or other person engaged in longshoring operations * * *." The Court noted, however, that the Congress had failed to define any of the key statutory terms such as "maritime employment," "longshoremen," or "longshoring operations." The Court therefore placed great reliance on the "typical example" of shoreward coverage provided in Committee Reports, which reads in relevant part:

“To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo.”

It should be emphasized that in its review of this “typical example,” the Court stated at 432 U. S. 268 that “the example makes it clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered [by the Act].”

In its analysis of this “typical example,” the Court set forth the applicable test for covered workers—that they must be “*engaged in the handling of cargo as it moves between sea and land transportation* after its immediate unloading.” 432 U. S. 267. (Emphasis added.)

In *P. C. Pfeiffer Co. v. Ford*, 62 L. Ed. 2d 234, the Court affirmed this test and made it the definitive test for determination of coverage, holding that Congress intended “a definition of Maritime Employment that reaches any

worker who moves cargo between ship and land transportation * * *." 62 L. Ed. 2d 237.

In *Pfeiffer* the Court further held at 62 L. Ed. 2d 236 that §2(3)'s terms "longshoreman" and "other person engaged in longshoring operations" refers to Workers doing tasks "*traditionally performed by longshoremen.*" (Emphasis added.)

Under the above described rules of law, it is clear that, based upon the established facts as shown in the record, claimant is not a covered employee under the Act because the claimant herein on the date of the accident and on all times prior to the accident was not engaged in handling of any cargo whether part of sea *or* land transportation and also because the job the claimant performed and to which he had been assigned for three months prior to his accident was not and is not work traditionally performed by longshoremen.

CONCLUSION.

For the foregoing reasons the claimant herein is not an employee covered by the Act because he did not meet either the situs requirement of §3(a) or the status requirement of §2(3) of the Act, and the petition for a writ of certiorari should therefor be denied.

Respectfully submitted,

LEONARD J. LINDEN
LINDEN & GALLAGHER
Attorneys for Employer
and Carrier, Respondents

1a

APPENDIX A.

OPINION OF THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 32-3146

- - - - - X

ERNEST G. MILLER,

Claimant/Petitioner,

vs.

PITTSTON STEVEDORING CORP., and NEW
JERSEY MANUFACTURERS INSURANCE
COMPANY,

*Employer/Carrier
Respondents,*

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Federal Respondent.

- - - - - X

Petition for Review
Benefits Review Board
(OWCP No. 2-54832)

Submitted Under Third Circuit Rule 12(6)
November 16, 1982
Before: ALDISERT, SLOVITER, and ROSENN,
Circuit Judges.

JUDGMENT ORDER.

After considering the contentions of the petitioner and the employer-carrier respondents, and applying the teachings of *P.C. Pfeiffer Co. v. Ford*, 444 U. S. 69 (1979), and *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249 (1977), it is

ADJUDGED and ORDERED that the petition to set aside the order of the Benefits Review Board be and the same is hereby denied.

Costs taxed against petitioner.

BY THE COURT,

s/ ALDISERT

Circuit Judge

3a

Attest:

s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

DATED: November 16, 1982

1b

APPENDIX B.

OPINION OF THE BENEFITS REVIEW BOARD.

BENEFITS REVIEW BOARD

U. S. DEPARTMENT OF LABOR

No. 80-1052

- - - - - X

ERNEST G. MILLER,

Claimant-Petitioner,

v.

PITTSTON STEVEDORING CORPORATION and
NEW JERSEY MANUFACTURER'S INSUR-
ANCE COMPANY,

*Employer/Carrier-
Respondents.*

- - - - - X

Appeal from the Decision and Order
of Reno E. Bonfanti, Administrative Law
Judge, United States Department of Labor.

Paul A. Gritz, Jersey City, New
Jersey, for the claimant.

Leonard J. Linden (Linden & Gallagher), Jersey City, New Jersey, for the employer/carrier.

Before: RAMSEY, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

PER CURIAM:

This is an appeal by the claimant from the Decision and Order (79-LHCA-2027) of Administrative Law Judge Reno E. Bonfanti pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter, the Act).

The administrative law judge found that claimant was not engaged in employment within Section 2(3), 33 U.S.C. §902 (3), and was not injured on a situs covered by Section 3(a), 33 U.S.C. §903(a). Therefore, he denied claimant benefits under the Act. Claimant appeals, arguing

that he was entitled to coverage under the Act. In addition, claimant argues that the administrative law judge erred in re-opening the record to permit employer to bring in an additional witness.

Preliminarily, we hold that the administrative law judge's decision to re-open the record was not an abuse of his discretion. 20 C.F.R. §702.338; 20 C.F.R. §702.347.

Moreover, having carefully reviewed the record and considered claimant's arguments in this case, we conclude that the administrative law judge's determination that claimant was not injured on a situs covered by Section 3(a) is supported by substantial evidence in the record considered as a whole, is rational and is in accordance with law. 33 U.S.C. §921 (b) (3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359

(1965). Therefore, the administrative law judge properly denied claimant benefits.

In light of this determination with regard to Section 3(a), it is unnecessary for us to reach the Section 2(3) issue.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

s/_____
ROBERT L. RAMSEY, Chief
Administrative Appeals
Judge

s/_____
JULIUS MILLER
Administrative Appeals
Judge

s/_____
ISMENE M. KALARIS
Administrative Appeals
Judge

Dated this 22nd
day of February 1982

5b

FILED AS PART
OF THE RECORD
FEB 22 1982

(date)

Agnes Kurtz / *h*

(Clerk)

Benefits Review Board

1c

APPENDIX C.

OPINION OF THE ADMINISTRATIVE LAW JUDGE.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
WASHINGTON, D.C. 20036

- - - - - X

IN THE MATTER

of

ERNEST G. MILLER,

Claimant,

vs.

PITTSTON STEVEDORING CORPORATION,

Employer,

NEW JERSEY MANUFACTURES INS. CO.,

Carrier.

- - - - - X

Case No. 79-LHCA-2027

OWCP No. 2-54823

Paul Gritz, Esq., for the Claimant.

Leonard J. Linden, Esq., for the
Employer/Carrier.

Before: Reno E. Bonfanti
Administrative Law Judge

DECISION AND ORDER.

This is a claim for workmen's compensation benefits under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*

The parties stipulated and I accept the following: (1) the employer-employee relationship existed, (2) claimant's injury arose out of and during the course of his employment, (3) claimant was injured on June 23, 1978 and remains temporarily totally disabled, (4) claimant was injured in an accident on the New Jersey Turnpike when he was driving a tractor trailer truck enroute from Port Newark,

New Jersey to Wilmington, Delaware, (5) the truck contained rigging or ship's gear to be used in loading or unloading of a car ship in Wilmington, (6) claimant's average weekly wage at the time of the accident was \$355, for a compensation rate of \$236.67, (7) claimant filed timely notice of the injury (8) claimant is receiving compensation for this injury under the New Jersey Compensation Act, (9) employer filed a notice of controversion on April 18, 1979.

The parties agree that the sole remaining issue in this case is the question of jurisdiction under the Longshore Act. This hinges upon whether the claimant meets the "status" and "situs" requirements of Sections 2(2) and 3(a) respectively, of the Act.

EVALUATION OF THE EVIDENCE.

The 33 year old claimant with a 10th grade education began working as a long-shoreman in 1968. He is a member of the ILA and has a union card indicating his job as a HOLD MAN. He testified that he goes aboard ship in addition to loading and unloading ship cargo in the warehouse by driving a fork lift. The claimant testified that on the morning of June 23, 1978 he was operating a fork lift on the truck live in the warehouse, and after lunch, his supervisor (Petrocelli) told him to go to the garage and pick up the truck, load ship's gear on it, and then drive it to a pier in Wilmington, Delaware. Claimant testified that after loading the truck, he drove onto the New Jersey Turnpike and about 30 minutes later the left front tire blew out and caused the accident. He also testified that when he was

assigned to driving a truck he received \$.25 more per hour than when he did other work. Claimant maintained a calendar for the months of May and June 1978 which were introduced into the record (Exhibit E-1, E-2). Claimant testified that he noted the days, hours, and job assignments on it. He testified that for the month of May 1978, on the 3rd, 4th, and 6th he did "longshore" jobs and the other days he was a truck or tractor driver. For the month of June 1978 he testified that on the 6th he was a checker (but the calendar shows "truck"), and that on the 13th and 14th he did "longshore" jobs. All other dates until June 23rd show his job as truck or trailer. There is no notation on June 23rd to indicate what work he was doing on that date because claimant testified he logged his time after the end of the day or the following workday. Ronald

J. Petrocelli, an engineer and manager of operations for Pittston, testified that approximately 3 months prior to the accident the claimant was assigned to a regular job as a truck driver to transport gear and gear parts to various places. He further testified that the claimant reported directly to him every morning. Petrocelli testified that on the morning of June 23, 1978, claimant reported directly to him, they assembled ship gear together for transport to Wilmington, claimant loaded the ship gear onto a truck, and then reloaded it onto a low bed trailer pursuant to Petrocelli's instructions, and then after lunch claimant began driving to Wilmington. Petrocelli testified that claimant did not handle any cargo on that day nor on his job as a truck driver.

After careful evaluation of the demeanor and credibility of the witnesses, I credit the testimony of Petrocelli as to the claimant's work on the date of the injury. I do not believe the claimant's testimony that he was working in the warehouse on the truck line, which he said was his "best recollection." I find that on the day of the injury his job consisted solely of loading ship's gear onto a trailer and driving it from Port Newark to a pier in Wilmington, Delaware, about 3 or 4 hours away. I find the accident in which he sustained injuries occurred on the turnpike approximately 30 minutes away from the shipyard. I find that on the date of the injury the claimant did not handle any cargo.

DISCUSSION AND CONCLUSIONS.

In order to meet the "status" requirements of Section 2(3) of the Act,

the claimant must be an employee "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship-builder, and ship-breaker ..." Also, the claimant must meet the "situs" requirement of Section 3(a) of the Act to establish "an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

The term "maritime employment" was defined in *Sedmak v. Perini North River Associates*, 9 BRBS 373 (1978). The Board stated that the claimant's employment must have a realistically significant relationship to maritime activities involving

navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3). This has been referred to as the necessity of a "close functional nexus," or "essential," or "integral part of" a maritime enterprise in order to be covered under the Act. In *P.C. Pfeiffer Co. v. Ford*, 100 S. Ct. 328 (1979), the Supreme Court stated that the crucial factor in the scope of maritime employment is the nature of the activity to which a worker may be assigned. In the case before me claimant was assigned the work of driving a truck, and in so doing, he was injured in a vehicle accident on a public highway, a significant distance from any shipyard or marine situs. The fact that the beginning and ending sites of his route were marine terminals does not give him "status" at any time.

Claimant's counsel cites the case of *Brady-Hamilton v. Herron*, 7 BRBS 409 (1978) to support his contention of coverage under the Act. That case is distinguishable on both status and situs grounds. The employee there was engaged in longshore work at least part of his working day and the gear locker room (2000 feet from water's edge), where he was injured, was found to be an adjoining area for loading vessels. As previously found herein, this claimant was not doing longshore work on the day of injury. In fact, for a period of 3 months he performed maritime jobs only infrequently-not more than 3 days during the month of injury and 3 days during the preceding month. It is recognized that the case of *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 mandates an expansive view toward the 1972 amendments and directs

continuous coverage for employees who would otherwise be walking in and out of federal jurisdiction during their regular performance. However, claimant herein was not in covered employment during any part of the day of injury and the accident occurred on a public turnpike, a considerable distance from navigable waters or "any adjoining area."

Recently, the case of *Fusco v. Perini North River Associates*, 601 F2d 659 (1979), was remanded to the Ct. of Appeals by the Supreme Court for reconsideration in light of the holding in *P.C. Pfeiffer v. Ford*, *supra*, that the term maritime employment refers to the nature of the worker's activities and that it is an occupational rather than a geographic concept. On June 4, 1980 the Ct. of Appeals (2nd Cir.) denied coverage to two sewage disposal construction workers who

were injured on a project over the water. It seems fair to conclude that Sections 2(3) and 3(a) as interpreted by case law requires that for coverage to attach, workers must meet both the "status" and "situs" criteria.

Based upon my analysis and evaluation of this record, I must conclude that the claimant has not satisfied the "status" requirements of Section 2(3) nor was the injury on a "situs" pursuant to Section 3(a) of the Act.

ORDER.

The claim for Ernest G. Miller for workmen's compensation under the Longshoremen's and Harbor Worker's Act is hereby denied.

s/_____
Reno E. Bonfanti
Administrative Law
Judge

REB/det

Dated: June 25, 1980
Washington, D.C.

APPENDIX D.

TEXT OF 33 U.S.C. 902(3), 33 U.S.C.
903(a) AND 28 U.S.C. 1254.

33 U.S.C. 902(3)

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. 903(a)

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any

adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area, customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of ---

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any state or foreign government or of any political subdivision thereof.

28 U.S.C. 1254

Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

No. 82-1373

Office-Supreme Court, U.S.

FILED

APR 30 1963

ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1982

ERNEST G. MILLER, PETITIONER

v.

PITTSTON STEVEDORING CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE

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QUESTION PRESENTED

Whether a maritime employee, injured while driving a tractor-trailer containing stevedoring gear on the New Jersey Turnpike 30 minutes after leaving his employer's marine terminal, was injured on a situs covered by Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 903(a).

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(IV)

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Longshoremen's and Harbor Workers'	
Compensation Act, 33 U.S.C. (& Supp. V)	
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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1373

ERNEST G. MILLER, PETITIONER

v.

PITTSTON STEVEDORING CORPORATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is noted in a table at 696 F.2d 983. The opinion of the Benefits Review Board (Pet. App. 1b-5b) is unreported. The decision and order of the administrative law judge (Pet. App. 1c-12c) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1982. The petition for a writ of certiorari was filed on February 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. 902(3), provides in pertinent part:

(1)

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker * * *.

Section 3(a) of the LHWCA, 33 U.S.C. 903(a), provides in pertinent part:

Compensation shall be payable under this [Act] in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

STATEMENT

Petitioner Ernest G. Miller was an employee of respondent Pittston Stevedoring Corporation (Pittston) (Pet. App. 2c). On the morning of June 23, 1978, pursuant to the instructions of Ronald J. Petrocelli, an engineer and manager of operations for Pittston, petitioner assembled stevedoring gear and loaded it onto a low bed trailer for transport from Port Newark, New Jersey to a pier in Wilmington, Delaware (*id.* at 6c-7c). After lunch, acting on Petrocelli's instruction, petitioner began driving the trailer to Wilmington; he was injured on the New Jersey Turnpike, 30 minutes from Pittston's Port Newark marine terminal, in an accident resulting from a blow-out of the trailer's left front tire (*id.* at 4c, 7c). As a result of the accident, petitioner was temporarily totally disabled (*id.* at 2c). Three months prior

to the accident, petitioner had been assigned to a regular position as a truck driver to transport gear and gear parts.¹

Petitioner was awarded compensation for his injury under the New Jersey Compensation Act (Pet. App. 3c). He then filed a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA" or "the Act"), 33 U.S.C. (& Supp. V) 901 *et seq.* The administrative law judge ("ALJ") denied petitioner's claim, finding that petitioner did not satisfy the jurisdictional prerequisites for coverage under Sections 2(3) and 3(a) of the Act, 33 U.S.C. 902(3) and 903(a) (Pet. App. 1c-12c). The ALJ held that petitioner did not satisfy the "situs" requirement of Section 3(a), because "the accident occurred on a public turnpike, a considerable distance from navigable waters or 'any adjoining area [customarily used by an employer in loading, unloading, repairing, or building a vessel]' " (Pet. App. 11c). The ALJ also found that petitioner did not satisfy the "status" requirement of Section 2(3) of the Act, because the "nature of the activity" to which petitioner was assigned, *i.e.*, driving a truck, did not constitute "maritime employment" (Pet. App. 9c).

Petitioner appealed the decision and order of the ALJ to the Benefits Review Board (the Board), pursuant to 33 U.S.C. 921(b)(3). The Board upheld the decision of the ALJ, finding that petitioner was not injured on a situs covered by Section 3(a) of the Act (Pet. App. 1b-5b). The

¹Petitioner performed cargo ^{handling} ~~holding~~ longshore jobs on five days out of the two months prior to the accident (Pet. App. 5c). Except for these isolated instances, petitioner routinely served as a stevedoring-gear truck driver during the three months prior to the injury (*id.* at 6c). The administrative law judge found that "on the day of the injury [petitioner's] job consisted solely of loading ship's gear onto a trailer and driving it from Port Newark to a pier in Wilmington, Delaware, about [three] or [four] hours away. * * * [O]n the date of the injury [petitioner] did not handle any cargo" (*id.* at 7c).

Board stated that “[i]n light of this determination with regard to Section 3(a), it is unnecessary for us to reach the Section 2(3) [status] issue” (Pet. App. 4b).

Petitioner then sought review of the Board’s decision in the court of appeals, pursuant to 33 U.S.C. 921(c). Relying on this Court’s decisions in *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979), and *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), the court of appeals summarily denied the petition to set aside the Board’s order (Pet. App. 1a-3a).

ARGUMENT

The court of appeals correctly upheld the Benefits Review Board’s determination that a truck driver, injured on the New Jersey Turnpike 30 minutes after leaving his employer’s marine terminal, does not meet the situs requirement of Section 3(a) of the LHWCA, 33 U.S.C. 903(a), and thus is not within the coverage of the Act. The decision below does not conflict with the decision of any other court of appeals, and further review by this Court is unwarranted.

1. Petitioner contends that the court of appeals, the Benefits Review Board, and the ALJ all erred in concluding that petitioner was not injured on a “situs” covered by Section 3(a) of the LHWCA.² Petitioner first argues (Pet. 10-19) that he qualifies as an “employee” within the meaning of Section 2(3) of the Act. He then contends (Pet. 19-23), in reliance on *Sea-Land Service, Inc. v. Director, OWCP*, 540 F.2d 629, 638 (3d Cir. 1976), that “once the status requirement of §2(3) is met the situs requirement of §3(a) is satisfied as well if the maritime worker was injured during the course of his employment” (Pet. 21).

²Section 3(a) requires that the injury occur “upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).”

The Board, upheld by the court of appeals, correctly determined, however, that because petitioner was not injured on a situs covered by Section 3(a), it was not necessary to reach the Section 2(3) status issue (see Pet. App. 3b-4b). In *Northeast Marine Terminal Co. v. Caputo*, *supra*, 432 U.S. at 264-265, this Court concluded that the 1972 Amendments to the LHWCA "changed what had been essentially only a 'situs' test of eligibility for compensation [requiring work-related injury on navigable waters] to one looking to both the 'situs' of the injury and the 'status' of the injured." Accord, *P.C. Pfeiffer Co. v. Ford*, *supra*, 444 U.S. at 73.³ This Court has recently reiterated that both the situs and status tests must be satisfied for an employee to fall within the coverage of the amended Act. See *Director, OWCP v. Perini North River Associates*, No. 81-897 (Jan. 11, 1983), slip op. 16-17.

Moreover, the Third Circuit has reevaluated its position in *Sea-Land* in light of this Court's subsequent decision in *Caputo*. In *Dravo Corp. v. Banks*, 567 F.2d 593, 594 (3d Cir. 1977), the court stated that *Caputo* "provides us with the relevant inquiries in determining whether coverage should be extended: both the situs of the injury and the status of the injured must be considered." 567 F.2d at 594. It

³The Court in *Caputo* (432 U.S. at 273) explained that the 1972 Amendments were designed to provide uniform federal compensation for amphibious workers who would otherwise be covered only for part of their activity. To remedy the "disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs," Congress in Section 3(a) enlarged the coverage of the Act to include workers who were injured on broadly defined "navigable waters," including areas adjacent to the water's edge. *Id.* at 263-264. The "maritime employment" status test was necessitated by the expanded geographical scope of the amended Act. *Id.* at 264.

therefore is safe to assume that *Sea-Land* was overruled by *Dravo* to the extent that it conflicted with *Caputo*.⁴

2. Petitioner also argues (Pet. 23-24) that the section of the New Jersey Turnpike on which the accident occurred qualifies under Section 3(a) as an "adjoining area customarily used by an employer in loading [and] unloading * * * vessel[s]." 33 U.S.C. 903(a). The Board, upheld by the court of appeals, correctly concluded that a major inland highway is not an "adjoining area" to "the navigable waters of the United States" within the meaning of Section 3(a).

As this Court explained in *Caputo*, in amending the Act Congress

wanted a "uniform compensation system to apply to employees who would otherwise be covered by * * * [the LHWCA] for part of their activity." * * * It wanted a system that did not depend on the "fortuitous circumstance of whether the injury * * * occurred on land or over water." * * * It therefore extended the situs to encompass the *waterfront areas where the overall loading and unloading process occurs*.

432 U.S. at 272 (emphasis added), quoting from S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10-11 (1972). The legislative history of the 1972 Amendments further states that the Act as amended "expands the coverage * * * to cover injuries occurring in the *contiguous dock area* related to longshore

⁴That the Third Circuit no longer adheres to the views it expressed in *Sea-Land* is made equally clear by the judgment order in the instant case (Pet. App. 1a-3a). Since the Board did not reach the "status" question, the decision of the court of appeals necessarily viewed the two tests independently. In any event, even if the decisions of the Third Circuit are inconsistent, that is a matter for the court of appeals, not this Court, to resolve. See *Wisniewski v. United States*, 353 U.S. 901 (1957).

and ship repair work." S. Rep. No. 92-1125, *supra*, at 2 (emphasis added).

Contrary to petitioner's contention, therefore, the New Jersey Turnpike does not qualify as a covered situs under Section 3(a) of the Act. The Turnpike — at least at the point where petitioner was injured — does not "adjoin" navigable waters (33 U.S.C. 903(a)), and is clearly not a "waterfront area []" (*Northeast Marine Terminal Co. v. Caputo*, *supra*, 432 U.S. at 272) or a "contiguous dock area" (S. Rep. No. 92-1125, *supra*, at 2). To include a major inland highway within the range of geographical coverage of the Act would be tantamount to eliminating altogether the Section 3(a) situs requirement, a requirement that Congress plainly intended to constitute an independent prong of the two-part status-situs test.⁵

⁵The decision below is consistent with decisions of the two courts of appeals that have considered the "adjoining area" language of Section 3(a). See *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978); *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981).

In *Brady-Hamilton*, the claimant was injured in a "gear locker," a building in which loading and unloading equipment was stored and repaired. 568 F.2d at 139. The building was "located approximately 2,600 feet north of the edge of the Columbia River and 2,050 feet outside of the entrance gate of the Port of Longview," at which Brady-Hamilton's facility was located. *Ibid.* The Ninth Circuit concluded that the gear locker was located in an "adjoining area." The court noted that the equipment housed in the gear locker "was used exclusively for loading and unloading vessels at the Port of Longview," and that the "[a]djacent buildings were used as gear lockers by other companies." 568 F.2d at 141. The court found, additionally, that the gear locker "was used as an integral part of longshoring operations" and "was located in as close proximity to the dock loading area as was feasible and as circumstances permitted." *Ibid.* See also *Handcor, Inc. v. Director, OWCP*, 568 F.2d 143, 144-145 (9th Cir. 1978) (warehouse located 50 to 60 feet from water's edge used to load and unload cargo containers

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE

Solicitor General

T. TIMOTHY RYAN, JR.

Solicitor of Labor

KAREN I. WARD

Associate Solicitor

ALLEN H. FELDMAN

Counsel for Appellate Litigation

JANICE B. CORWIN

Attorney

Department of Labor

APRIL 1983

qualifies as terminal customarily used in loading and unloading vessel under Section 3(a)).

In *Texports*, the employer maintained three "gear rooms" used to store and maintain loading equipment; two were located on the docks and the third, owing to insufficient space on the docks, was located "on Avenue N, five blocks from the gate of the nearest dock." 632 F.2d at 506-507. The claimant, a "gear man," was injured at the Avenue N gear room. *Id.* at 507. The court, finding that the Avenue N "gear room operations were part of the on-going overall loading process," and that "[t]he gear room was as close to the docks as was feasible," concluded that the room had "sufficient nexus to the waterfront" to qualify as within "an area customarily used by employers for loading." *Id.* at 515.

The section of the New Jersey Turnpike located 30 minutes away from respondent Pittston's marine terminal does not qualify as an "adjoining area customarily used by an employer in loading [and] unloading * * * vessel[s]" (33 U.S.C. 903(a)) under either the Ninth Circuit's or the Fifth Circuit's construction of the language of Section 3(a). The Turnpike lacks "proximity" to the waterfront (*Brady-Hamilton, supra*, 568 F.2d at 141); it is not "close to or in the vicinity of navigable waters, or in a neighboring area." *Texports, supra*, 632 F.2d at 514.